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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/722,786	11/26/2003	John O'Connell	F3322(C)	7240

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EXAMINER

PRATT, HELEN F

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 09/29/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

10/722,786

Applicant(s)

O'CONNELL, JOHN

Examiner

Helen F. Pratt

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE \_\_\_\_ MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-25 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-25 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some \* c) ☐ None of:
- ☒ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_.

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## **DETAILED ACTION**

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 24 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 9 is indefinite in that it is incomplete.

Claim 24 is indefinite in the use of the term "widget". It is not know what applicant intends to claim by the use of this term.

### ***Claim Objections***

Claims 3, 4, 13, 18, 20, 21 are objected to because of the following informalities: the above claims need periods at the end of the claims. Appropriate correction is required.

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-25 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-28 of copending Application No. 10/722,783. Although the conflicting claims are not identical, they are not patentably distinct from each other because same beverage composition is claimed.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 25, 13, 14, 17, 1-12, 15-18, 24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Zeller et al. (6,168,819) in view of Kaper (EP 0745 329 A:1) and (bolt et al. (GB 2299978 A).

Zeller et al. disclose a method of making a containerized beverage product, which has a container holding a composition of octenylsuccinic acid modified starch (N-Creamer —46 starch, page 4, line 14 found in applicant's specification) and a surfactant such as sodium stearyl lactylate (col. 6, lines 25-38, col. 6, lines 1-11, col. 7, lines 60-68, col. 8, lines 1-21). The protein is denatured whey protein, (col. 8, lines 22-28, col. 2, lines 54-70). Gasifying a liquid composition is shown by Zeller et al. before the product

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is dried (col. 16, lines 53-70). Claim 25, 13, 14, 17 differ from the reference in the method injecting a beverage in a container with nitrogen gas, and in adding enough nitrogen to provide a particular pressure and in sealing the container. However, the reference discloses that the composition can be gasified to a bulk density of 0.1 to 0.55g/cc (col. 16, lines 13-16). Kaper discloses that it is known to make a carbonated coffee beverage, which has been packaged under pressure in a pressure resistant closed container with carbon dioxide and nitrogen using an amount of pressure, which is within the claimed amount (col. 4, lines 30-34 and abstract). The nitrogen improves the taste and enhances the foam structure (col. 2, lines 14-60, page 3, lines 1-20, abstract). Bolt et al. disclose that it is known to use nitrous oxide in a pressured container to pressurize a milk containing beverage and that carbon dioxide imparts a sharpness of flavor to milk, which is not desirable in all milk products (page 3, lines 5-15, page 8, lines 28-36). It is known that milk powder contains protein, casein. The composition can contain stabilizers and emulsifiers (page 5, lines 18-36). Therefore, it would have been obvious to gasify with nitrogen the composition of Zeller et al. before it is dried and is in a liquid state, using the processes of Kaper et al. and Bolt.

The composition of claims 1, 2, 4 has been disclosed above and are obvious for those reasons.

Claim 3 further requires a particular method of forming the modified starch. However, in a composition claim the method of preparing the product is not given weight. Therefore, it would have been obvious to use the claimed starch as shown by the reference to Zeller et al.

Claim 5 further requires that the percent molar substitution is a particular amount and claim 6 that % is a particular amount. However, Applicant's specification discloses on page 4, line 14, N-Creamer —46 starch. One cannot tell from this passage what the degree of substitution is. Since the Applicant is using the same material and cites it in his specification, the burden is put on the Applicant to show that his starch is different, and how his product differs from that of the reference to Zeller et al. Therefore, it would have been obvious to use known starches as shown by Zeller et al.

The further limitations of claims 7, as to molecular weight, and amounts as in claims 8 and 9, and the types of acyl lactylate acyl moieties as in claims 10 and 11, 12 in particular amounts as in claims 15, 16 are seen as being within the skill of the ordinary worker to determine, absent anything new or unobvious using the claimed limitations. Also, nothing is seen that the claimed ingredients are not the same as disclosed above. Therefore, it would have been obvious to choose particular characteristics of known substances.

Claim 18 further requires the use of particular types of protein. Zeller et al. disclose the use of whey protein concentrate or isolate (col. 2, lines 49-53). Bolt et al. disclose the use of dairy milk or skimmed milk, both of which are known to contain caseinate (col. 6, lines 14-2) and Kaper disclose the use of a product which contains milk (col. 2, lines 9-14). Therefore, it would have been obvious to use known types of protein in the claimed composition.

Claim 24 further requires that the container contain a widget. However, it is not known what applicant considers to be a widget, and no weight is given to an apparatus

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limitation in a composition claim. Therefore, it would have been obvious to use known parts of a container, as spray container are generally well known.

Claims 19-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over the above references as applied to the above claims, and further in view of Ueda et al. (5,637,337).

Claims 19-23 further require the use of a sucrose ester as a monoester, and in particular degrees of carbon atoms and using particular fatty acids, in particular amounts of the composition. Ueda et al. disclose the use of an antifoaming agent (abstract). Ueda et al. disclose that agents for improving water dispersibility are sucrose esters and octenylsuccinic acid-starch (col. 1, lines 38-41). As they are known surfactants, it would have been obvious to use one or more in the claimed composition for their known use as surfactants.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 571-272-1404. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.


If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR

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only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Hp 9-6-05

  
**HELEN PRATT**  
**PRIMARY EXAMINER**